APPENDIX I

PRETRIAL STIPULATION OF FACT SUBMITTED BY PARTIES

1) Plaintiffs, Erin Otis and Vernellia Randall, are citizens of Ohio and registered voters who reside in Montgomery County.

2) Plaintiffs, Howard Tolley and Art Slater, are citizens of Ohio and registered voters who reside in Hamilton County.

3) Plaintiffs, Effie Stewart and Marco Sommerville, are citizens of Ohio and registered voters who reside in Summit County.

4) Plaintiff, Linda See, is a citizen of Ohio and registered voter who resides in Sandusky County.

5) Plaintiffs, Randall, Slater, Stewart and Sommerville are African-Americans.

6) Defendant, J. Kenneth Blackwell, is the Secretary of State of Ohio and chief elections officer of the State of Ohio.

7) Defendants, Raymond Butler, Geraldine Lewis and Larry Loutszenhiser are members of the State Board of Voting Machine Examiners for the Approval of Electoral Marking Devices.

8) Defendants, Alex Arshinkoff, Joseph Hutchinson, Wayne Jones and Rus Pry are members of the Summit County Board of Elections.

9) Defendant, Christopher Heizer is Director of the Montgomery County Board of Elections, Defendant Stephanie Harsman is Deputy Director of the Montgomery County Board of Elections, and Defendants, Sue Finley, Thomas Ritchie, Sr., James Nathenson, and Dennis Lieberman are members of the Montgomery County Board of Elections.

10) Defendants, Timothy Burke, Michael Barrett, V. Daniel Radford and Todd Ward are and at all relevant times were members of the Hamilton County Board of Elections.

11) Defendants, Harry Heyman, Thomas Yonker and John Rettig are and at all relevant times were members of the Sandusky County Board of Elections.

12)   Pursuant to Ohio Rev. Code Ann. § 3506.06(B) (Anderson 2003), Defendant, J. Kenneth Blackwell has certified and Defendant, Ohio Board of Voting Machine Examiners ("State Defendants") have approved a variety of voting systems for use in Ohio elections, including equipment that contains a feature which gives voters notice of overvotes and/or undervotes and also equipment that does not contain such a feature.

13)   The election systems that State Defendants have certified and that county officials currently utilize are: 1) punch card voting; 2) optical scan voting; 3) direct record electronic (or "DRE") voting; and 4) lever machines (also known as "automatic voting machines").

14)   Ohio is pervasively a punch card voting state. Sixty-nine (69) of Ohio's 88 counties use punch card voting. Those 69 counties include 72.5% of the states' registered voters, and 74% of the 11,756 precincts in the State of Ohio.

15)   Among the 19 non-punch card counties in the State of Ohio, 11 use optical scan equipment, six use electronic voting equipment, and two use lever machines.

16)   Some voting systems have a feature which provides some form of active feedback from a ballot reader that instantly informs a voter of potential errors on her ballot and allows the voter to make any needed corrections. This feature is commonly know as a "second chance" feature.

17)   Most counties in Ohio do not utilize voting machines which have the described "second chance" feature.

18)   Punch card voting machines do not provide voters with actual notice of overvotes and undervotes.

19)   The punch card system relies on a ballot card with pre-scored, square perforations or "chad." The names of candidates are not on the ballot card, but each chad is assigned a number which appears in small type on the ballot card. The ballot card has a stub at one end, with two holes that allow the card to be held in place over pins, when the ballot is inserted into the "Votomatic" device. This device is placed on a table in front of the voter and holds the ballot card during the voting process. The device has attached to it a loose-leaf booklet, with the names of candidates or other items to be voted on listed in the booklet. In the center of the booklet is a slot which should line up with columns in the ballot card. Along the slot are holes. If the ballot card is correctly positioned within the device and the device has been correctly assembled, each chad lies beneath a different hole. A voter casts his or her vote by placing the ballot card in

the device, and exerting pressure on a stylus through the hole to "punch" chad in the ballot card corresponding to the desired choice. After the voter has completed the voting process, he or she removes the card from the device. The stub is removed from the ballot. The cards are thereafter run through a mechanical tabulator and recorded by a computer.

20) Hamilton, Summit, and Montgomery Counties are among the 69 counties that use punch card voting equipment.

21) There are two types of optical scan systems used in Ohio: "central-count" optical scans, and "precinct-count" optical scans. Precinct-count optical scan systems have an error-correction feature which gives voters a chance to discover and correct possible mistakes at the poll, while central-count optical scan systems does not have such a feature.

22) In the 2000 election, Sandusky County used a punch card voting system. Beginning with the 2001 election and continuing for all subsequent elections, Sandusky County has utilized a central-count optical scan system.

23) Electronic or "DRE" voting machines can be programmed to alert voters that they have not made a choice in a particular race. DRE technology advises voters of the choices they have made, showing whether they have undervoted, and gives them a message allowing them to review and verify their choices before casting their votes. Additionally, DRE technology can be programmed to prevent overvoting.

24) An "overvote" occurs when a voter registers more than one choice for a candidate in a particular race and thereby disqualifies his or her vote for that particular race. An "undervote" occurs when a voter does not mark a ballot in a particular race or votes for fewer than the allowed number of candidates. "Residuals votes" are overvotes and undervotes combined.

25) The counties in Ohio experiencing the highest percentages of residual votes in the 2000 presidential election were those in which voters used punch card ballots, while the counties experiencing the lowest percentage of residual votes in this election used other technology. The 29 counties in Ohio with the highest residual vote percentages in the 2000 presidential election were all counties that use the punch card method of voting. The seven counties with the lowest residual vote percentages in the 2000 election were all counties that did not use punch cards as their primary voting system.

26) The information contained in Tables 1-6 of John Lott's Report is accurate.

27) The information contained in Tables 1 and 2 of Martha Kropf's Affidavit is accurate.

28) In the 2000 presidential election, the statewide residual vote rate was 1.88%.

29) The information contained in the Summary Report for the 2000 election in Ohio is accurate. See Doc. No. 187, Appendix E.

30) Some residual votes occur when voters intentionally choose not to cast votes in a particular race. Examining ballots does not allow for intentional and unintentional undervotes to be distinguished.

31) The information contained in Table 1 of Kropf's Report is accurate.

32) The three counties that are the subject of Plaintiffs' Voting Rights Act claim, Hamilton, Summit and Montgomery Counties, all use the Votomatic punch card voting system.

33) The demographic information for Hamilton, Summit, Montgomery and Franklin Counties contained in Richard Engstrom's Report is accurate.

34) The Census 2000 Summary for Hamilton, Summit and Montgomery Counties is accurate.

35) Dr. Richard Engstrom used three analytic procedures to assess the extent to which the African-American voters overvoted or undervoted at different rates than non-African-American voters in each of these counties. Homogeneous precinct ("HP") analyses simply report the percentage of the voters that overvoted or undervoted in the precincts in which over 90 percent of the voting age population was not African American and in those in which over 90 percent was African American. Ecological Regression ("ER") analyses provide estimates of these rates for African American and non-African American voters based on the votes cast in all of the precincts in an election. The third methodology is called Ecological Inference ("EI"). This is an estimation procedure that also takes into account all of the precincts in which votes are cast.

36) The information concerning overvoting in Hamilton and Summit Counties contained in Engstrom's Report is accurate.

37) The information concerning undervoting in Hamilton and Summit Counties contained in Engstrom's Report is accurate.

38) The information concerning overvoting and undervoting in Montgomery County contained in Engstrom's Report is accurate.

39) The 2000 Ohio Census Data giving rise to State Defendants' Table of residual vote rates in fourteen Ohio Counties is accurate.

40) Adams County, which has a total of 48 African-Americans living in the entire county, had 492 residual votes for President in the 2000 Presidential Election. Holmes County, which has 127 African-American residents, had 792 residual ballots in the 2000 Presidential election. Jackson, Meigs, Monroe, Pike, and Vinton Counties also had more residual votes for President in the 2000 election than African-Americans living in the jurisdiction.

41) African-Americans make up 27.4% of the population of Cuyahoga County, and there are more African-Americans living in Cuyahoga County than there are people in 83 of Ohio's 88 Counties.

42) In the 2000 presidential election, Cuyahoga County used punch cards.

43) Delaware County, Ohio uses punch cards while Franklin County uses electronic voting machines and, in the 2000 elections, Delaware County had 55,959 total votes cast and 55,403 votes cast for President for a residual vote total of 556 votes or 0.99% while Franklin County had 417,800 total votes cast and 414,074 votes cast for President for a residual vote total of 3,726 votes or 0.89%.

44) Shortly after the effective date of the Help America Vote Act ("HAVA"), Ohio Secretary of State J. Kenneth Blackwell reconfigured his office and required many of his senior staff to focus on implementing HAVA in the State of Ohio.

45) In May of 2003, Secretary Blackwell's Office finalized Ohio's HAVA Plan and published the document for the public's review.

46) In September 2003, the Secretary of State's Office qualified the following four vendors to offer voting devices in Ohio: 1) Sequoia Voting Systems; 2) Diebold Elections Systems; 3) Election Systems & Software; and 4) Maximus/Hart Intercivic/DFM Associates, pending a security review for all prospective voting devices.

47) The security reviews revealed that there were 57 potential security risks within the software and hardware for prospective voting devices and, in December 2003, the Secretary of State ordered the qualified voting device vendors to resolve the identified security concerns.

48) The Ohio Secretary of State's Office submitted a request to the State's Controlling Board

for release of monies to begin the process of replacing the State's existing voting technologies, and the request was temporarily delayed. The Ohio General Assembly created a House-Senate Ballot Security committee to ensure that all replacement machines will provide accurate, reliable and tamper-proof results.

49) On May 7, 2004, Governor Bob Taft signed H.B. 262 into law.

50) Punch card voting equipment in Hamilton County is maintained on an ongoing basis and it is cleaned at least annually by having the displaced chad removed from the interior tray. The cleaning includes sharpening the styluses in advance of every election.

51) Hamilton County poll workers are trained on how to set up the precinct polling location, how to conduct the election, and what to do when the polls close.

52) Hamilton County poll workers are instructed to ask every voter if they require assistance or would like a demonstration on how to cast a valid vote.

53) All Hamilton County polling locations have a demonstrator voting machine so that voters may practice prior to voting.

54) Hamilton County poll workers are trained on provisional balloting.

55) Hamilton County poll workers are trained on what to do with a soiled or defaced ballot.

56) There are voting instructions permanently affixed to all individual voting booths in Hamilton County. Further, instructions are included on the ballots themselves and handouts of the instructions are available to the voter.

57) The instructions in the booths and on the ballots in Hamilton County are mandated by the Secretary of State.

58) The voting instructions placed in each booth in Hamilton County provide a written description of the six step process involved in casting a valid ballot and a visual diagram on how it is to be accomplished.

59) The voting instructions placed in each booth in Hamilton County also advise the voter: 1) what to do if they require assistance due to blindness, disability, or inability to read or write; and 2) that they may return a torn, soiled, defaced, or erroneously marked ballot to the precinct election official and have a new ballot issued to them.

60)   The voting instructions included on each ballot in Hamilton County advise the voter to: 1) insert your ballot card with both hands; 2) be sure the red pins are through the two holes; 3) use only the punching tool attached to the Votomatic; 4) if you make a mistake, return your ballot card to the precinct official and receive a new one; 5) to write-in a candidate name, write the candidate name and office on the top of the ballot card.

61)   The Hamilton County Board of Elections has procedures for re-making ballots that are defaced, ripped, or put in backwards.

62)   In Hamilton County, ballots that are defaced, ripped or may have some problems with it, or where a ballot was placed in backwards in the machine, are identified and, where it is possible to determine what the voter intended, the Ballot is "remade" and then counted.

63)   The ballots are remade by a bipartisan team comprised of staff members of the Hamilton County Board of Elections. If there is a dispute regarding remade ballots, it is brought to the members of the board.

64)   The Chairman of the Hamilton County Board of Elections is unaware of any specific instance in which the Board has been unable to agree on if, or how, a ballot should be remade.

65)   In Hamilton County, in the event a ballot is remade, both the original ballot and the remade ballot are retained by the Board of Elections.

66)   When a Sandusky County voter receives her optical scan ballot, a poll worker gives personal instructions to that voter, including to use only the pencil provided in the voting booth and to look at the instructions printed on the top of the ballot. Additionally, the voter is shown the candidates and issues and is also shown the corresponding ovals, and is also told to color in the oval to the left of their choice. Finally, the same instructions are written and posted in the voting booth right in front of the voter's eyes.

67)   In Sandusky County, in order to cast a vote on the optical scan ballot, the voter simply blackens in the oval to the left of the voter's choice with the pencil provided. Voters are informed that they should return their ballot to the presiding poll judge if they make a mistake on their optical scan ballot to receive a new ballot. When the voter has completed voting on the optical scan ballot, she takes it and places it into the ballot box. After the polls are closed, the ballot boxes are locked and brought back to the office of the Sandusky County Board of Elections. These boxes are then opened and several employees examine the ballots to make sure that they are all facing the correct way. The ballots are then passed on to a board member who brings them up to the tabulating

machine (a.k.a. tabulator), puts the ballots into the tabulating machine, and then runs the ballots through the tabulating machine. The tabulating machine is operated by either a clerk or by the Director of the Board of Elections. If a ballot is rejected by the tabulating machine, the machine stops and a digital read-out on the machine states what the problem is. The problem is that an overvote, an undervote, or a blank ballot was detected. When this occurs, two board members then look at the ballot, and, according to the guidelines given by the Ohio Secretary of State, they determine what to do with the ballot.

68) In Sandusky County, when a ballot is rejected, for example, because a voter did not fill in the oval enough, and it is clear that the voter did not intend to vote for someone else, then that oval is filled in completely.

69) A voter might use an unauthorized device, such as an ink pen, to fill out their ballots. However, in Sandusky County, this only will occur if the voter ignores one explicit oral instruction from a poll worker not do that, as well as two written instructions.

70) With the optical scan ballot system currently used by Sandusky County, like the punch card ballot system before it, the Director of the Sandusky County Board of Elections and the Deputy Director hand count at least two precincts after every election in order to double check that the machines are accurately counting the votes cast. To date, none of the hand counts has demonstrated a discrepancy. The Director and Deputy Director will continue to do a hand count. This will continue to occur even when touch screen ballots are utilized.

71) Sandusky County switched from punch card voting machines because it was difficult to get the machines repaired. Sandusky County decided to use an optical scan system with central location tabulation, as opposed to an optical scan system with in-precinct tabulation because the in-precinct tabulation machines are more expensive than the central tabulation machines and because the in-precinct machines are more cumbersome.

72) Sandusky County has and continues to uniformly administer the optical scan ballot with central location tabulation to all of its voters.

73) While it is not possible to cast an overvote in Franklin County, which uses electronic voting equipment, it is still possible to cast a mistakenly valid vote (cast a valid vote, but only for someone other than who the voter intended to vote for).

74) In Franklin County, a voter error occurs when a voter fails to press the "vote" button,

or a voter-parent takes a child into the booth with them and the child presses the "vote" button before the voter-parent has completed the voting. Nothing can be done to remedy these errors.

75) Voters do report that they intentionally undervoted, or did not cast a vote, in presidential elections.

76) Short of violating voters' privacy rights, asking voters if they voted in a particular race or not (through an exit poll) is the only way to figure out if an undervote is intentional or accidental.

77) Sandusky County did not use an optical scan ballot in 2000, but instead used a punch card ballot.

78) In a special election in Sandusky in May 2003, which only had one issue on the ballot, with the exception of one district that had two issues on the ballot, there were only three overvotes cast that were rejected by the tabulation machine.

79) In the 2000 General Election in Ohio, a 0.93% residual vote rate occurred in Allen County (which used optical scan with in-precinct tabulation) and 2.4% residual vote rate occurred in Mahoning County (which used optical scan with central tabulation). The only other county that used an optical scan ballot with in-precinct tabulation in the 2000 Presidential election was Hancock County, which had a residual vote rate of 1.2%. Ashland, Geauga, Hancock[1] and Ottawa Counties all used optical scan ballots with central tabulation in that election and had the same or a lower residual vote rate than did Hancock County. Additionally, Coshocton County only had a residual vote rate of 1.5% in that race. Coshocton County used an optical scan ballot with central tabulation.

80) The parties stipulate to the authenticity and accuracy of the following remarks of the Chairman of the Hamilton County Board of Elections, Mr. Timothy Burke, as made in a letter to Congresswoman Stephanie Tubbs Jones, dated July 18, 2001 (Doc. 171-40-7c):

a) "2.25% of the people who voted in the 1999 Cincinnati City Council Election had their votes disqualified because they overvoted by voting for more than nine candidates."

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[1]Hancock County used both optical scan ballots with both in-precinct and central tabulation.

b) "Twenty-three of the twenty-five precincts in Hamilton County that experienced the highest rates of overvoting in the 1999 Cincinnati City Council Election were minority, largely poor precincts."

c) "Of the 25 precincts that had the most overvotes cast in the 2000 Presidential Election in Hamilton County, all 25 appear to be minority, mostly poor precincts."

81)   In the presidential election of 2000, the highest rates of overvoting in Hamilton and Summit Counties occurred in Cincinnati Precinct 22-F (6% overvote, 95% black) and Akron Precinct 3-K (6% overvote, 80% black) where substantial percentages of black voters reside. (Docs. 206-3-c, 206-4-d).

82)   The voting databases from the Ohio Secretary of State's Office and the Summit, Hamilton, and Montgomery County Boards of Election, which all counsel and experts on both sides of the case have used to determine the level of residual ballots, overvotes, and undervotes in the precincts, wards, and counties of Ohio in the 1992, 1996, and 2000 presidential and U.S. Senate elections, as well as the City of Cincinnati mayoral and city council elections of 2001 and the Hamilton County Primary Election of 2004, are authentic and accurate.

83)   The State Help America Vote Act (HAVA) Report (Doc. 115-1) is authentic and accurate.

84)   All exhibits in trial binders are authentic.

85)   All named Plaintiffs voted in the 2000 presidential election, with the exception of Vernellia Randall. All named Plaintiffs, including Vernellia Randall, plan to vote in subsequent presidential elections.

86)   There is no evidence in the record of these proceedings that the named Plaintiffs from Hamilton, Montgomery, Sandusky, and/or Summit County were denied in any way equal access to the polls.

87)   There is no evidence in the record of these proceedings that the named Plaintiffs from Hamilton, Montgomery, Sandusky, and/or Summit County were denied in any way equal access to the voter instructions placed in each voting booth, on each ballot, and available at the polling location.

88)   There is no evidence in the record of these proceedings that the named Plaintiffs from

Hamilton, Montgomery, Sandusky, and/or Summit County were denied in any way equal access to assistance from poll workers in casting a ballot, if they required it.

89) There is no evidence in the record of these proceedings that the named Plaintiffs from Hamilton, Montgomery, Sandusky, and/or Summit County were prevented from attempting to cast their vote in the 2000 general election.

90) All deposition testimony arising out of these proceedings is indeed the witness' testimony, and it may be admitted into evidence.

91) The information contained in Tables 2, 3, and 4 of Martha Kropf's Report is accurate.

92) In the 2001 Cincinnati mayoral election, a Hamilton County election, 89,000 votes were cast, of which 113 votes were overvotes – a citywide rate of slightly more than one-tenth of one percent. (Percentages were obtained by dividing the overvote by the ballots cast.) (Doc. 192; Williams affidavit at ¶ 2, exhibit 1).

93) In the 2001 Cincinnati mayoral election, no ward had a percentage rate of overvotes greater than four-tenths of one percent. Twenty-five precincts had more than one overvote while no precinct had more than three overvotes. The range of overvotes of all precincts where more than one overvote occurred was 0.34 to 1.6 percent with six of these precincts falling within the range of equal to or greater than one percent. (Doc. 192; Williams affidavit at ¶ 2, with attached exhibits).

94) In the Cincinnati City Council election of 2001, out of 376 precincts, 101 precincts had an overvote rate of 2%, 79 precincts had an overvote rate of 3%, 50 precincts had an overvote rate of 4%, 18 precincts had an overvote rate of 5%, 10 precincts had an overvote rate of 6%, 9 precincts had an overvote rate of 7%, 2 precincts had an overvote rate of 8%, and 2 precincts had an overvote rate of 10%.

95) In the Republican Party Primary for Hamilton County Commissioner which was held on March 2, 2004, overvoting occurred within the townships with largely white populations at a higher rate than the rate of overvoting which occurred in the 2001 Cincinnati mayoral election. All but one of these townships had rates over one percent, with a range of 0.7 to 2.0 percent.

96) The percentage of white residents within Hamilton County Townships together with the percentage of overvoting occurring in the 2004 Republican Party Primary for Hamilton County Commissioner are: Anderson Township, 96.57% white population, 1.5% overvote; Colerain Township, 87.77% white population, 1.1% overvote; Columbia

Township, 61.74% white population, 1.3% overvote; Crosby Township, 97.89% white population, 0.7% overvote; Delhi Township, 97.65% white population, 1.8% overvote; Green Township, 97.53% white population, 2.0% overvote; Harrison Township, 98.23% white population, 1.5% overvote; Miami Township, 98.71% white population, 1.7% overvote; Springfield Township, 67.06% white population, 1.5% overvote.

97) The parties stipulate to the admissibility of the optical scan ballot used by the Sandusky County Board of Elections in the November, 2002 General Election, which is entitled "General Election Ballot - November 5, 2002, Sandusky County Ohio."

98) The parties stipulate to the admissibility of the written directions that the Sandusky County Board of Elections has posted in the voting booth right in front of the voter's eyes in each election in which an optical scan ballot has been utilized.